Supreme Court, U.S.
FILED

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SHERMAN NOBLE PETITIONER

VS.

LARRY NORRIS, DIRECTOR RESPONDENT
THE ARKANSAS
DEPARTMENT OF CORRECTIONS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BY: SHERMAN NOBLE
Inmate No. 100015
2501 State Farm Road
Tucker, AR 72168
Pro Se, Petitioner

54 pp

QUESTIONS PRESENTED

Petitioner Sherman Noble was convicted on a Sunday, October 25, 1992 of Capital Murder in direct violation of an Arkansas statute directly prohibiting court proceedings on Sundays, and in violation of the First and Sixth Amendments to the Arkansas and United States Constitutions. Instantly, petitioner submits the following questions for review:

I. Whether Sherman Noble is entitled to habeas corpus relief where his conviction was void by a violation of State law prohibiting court proceedings on Sundays; and where the sentence was imposed in violation of the U.S. and Arkansas Constitutions;

II Whether Sherman Noble is entitled to review of his timely and properly filed appeal where the Arkansas Supreme Court arbitrarily refused to review the Sunday court issue.

III Whether Sherman Noble was denied effective assistance of counsel at both the trial level and on appeal, and therefore entitled to post-conviction Rule 37 relief and/or Habeas Corpus relief where he met the "prejudice" prong of *Strickland*;

IV Whether Sherman Noble is entitled to relief where he was denied his absolute right to

appeal in violation of his Sixth Amendment right to effective assistance of counsel and where the instant conviction was obtained by a plea of guilty which was unlawfully induced or not made voluntarily with the understanding of the nature of the charge and the consequences of the plea;

V. Finally, Petitioner seeks review and clarification on the purports of the law and/or for overruling current controlling law, the applicability of 28 U.S.C. §2244 *(as amended)* of the Antiterrorism and Effective Death Penalty Act (hereinafter "AEDPA") to the instant cause when combined with "good cause" for procedural defects and the state non-futile exhaustion of state remedies requirement.

VI Whether Sherman Noble is entitled to relief where his conviction was obtained by use of coerced confession; and in violation of the privilege against self-incrimination

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TITLE PAGE

Questions Presented for Review.....2-3

List of Parties 4

Table of Contents.....5-6

Table of Authorities.....7-8

Jurisdictional Statement (Opinions Below) 9-11

Constitution and Statutory Provisions Involved...12-18

Statement of the Case.....19-23

Brief Argument 23-30

Reasons for Granting the Petition.....30-31

Conclusion.....31

INDEX TO APPENDICES.....32

APPENDIX A- Judgment and Commitment Order from trial Court

APPENDIX B - Dismissal of Direct Appeal by Arkansas Supreme Court

APPENDIX C - Denial of Rule 37 Post-conviction

Relief by trial court

APPENDIX D - Supreme Court of Arkansas affirmed trial court

APPENDIX E - Denial of Petition to Set Aside Plea from trial court

APPENDIX F - Supreme Court of Arkansas affirmed trial court

APPENDIX G - U.S. District Court's denial of Habeas Corpus relief

APPENDIX H - U.S. Court of Appeal affirms five of six issues

Proof of Service (Separate Attachment)

TABLE OF AUTHORITIES

United States Supreme Court Cases:
Brown v. Allen, 344 U.S. 443 (1953)
Cuyler v. Sullivan, 446 U.S. 335 (1980)
McClesky v. Zant, 499 U.S. 467 (1991)
Murray v. Carrier, 477 U.S. 478 (1986)
Reed v. Ross, 468 U.S. 1 (1984)
Strickland v. Washington, 466 U.S. 688 (1984)
Wainwright v. Sykes, 433 U.S. 72 (1977)

Arkansas Case Law:
Chester v. Ark. State Bd of Chiro. Exam'rs, 435 S.W.2d 100 (1968)
Noble v. State, 319 Ark. 416 (1995)

Arkansas Court Rules:
Rules 37.1, 2, 4 of the Ark. Rules of Criminal Procedure
Rules 24.3, 4 of the Ark. Rules of Criminal Procedure
Rules 31.1, 4 of the Ark. Rules of Criminal Procedure
Rule 14 of the Ark. Rules of Appellate Procedure–Criminal
Rule 4-3 of the Rules of the Arkansas Supreme Court

United States Constitution:
U.S. Const. Amends. 1, 5, 6, & 14
U.S. Const. Art. 2, Sec. 10, cl. 1 (effective assist)

Arkansas Constitution:
Constitution of Arkansas, Articles 2, §7 & §12

United States Statutes:
28 U.S.C. Section 1254
28 U.S.C. Section 2254
28 U.S.C. Section 1257(a)
28 U.S.C. Section 1651(a)

Arkansas Statutes:
A.C.A. Section 16-91-113(S.Ct. Review-prejudicial)
A.C.A. Section 16-112-102, 103(Habeas)
A.C.A. Section 16-10-114

Books and Treaties:
26 A.L.R. 2d 997

JURISDICTIONAL STATEMENT

This is an appeal from a conviction following a conditional guilty plea entered in this matter by Petitioner in the Circuit Court of Jefferson County, Arkansas on Sunday, October 25, 1992.

OPINIONS BELOW

State Courts.

Petitioner, Sherman Noble was sentenced to Life Imprisonment without the possibility of parol, and judgment was entered by the State trial court on or about October 26, 1992. (Appendix A). Mr. Noble's plea of guilty had been "conditional" with the right to appeal his motion to suppress.

Thereafter an appeal was taken to the Arkansas Supreme Court which denied Noble his right to appeal stating that his trial counsel had failed to reduce the "condition" to a writing. The opinion appears herein at Appendix B. (Rehearing denied, Appendix B(1). And see, the published opinion, *Noble v. State*, 314 Ark. 240, 862 S.W. 2d 234 (1993).

Then on November 29, 1993, Noble filed a petition for Rule 37 post-conviction relief (Sixth Amendment right to effective assistance of counsel).

From this petition, the Circuit Court of Jefferson County, Arkansas held that Noble's counsel was indeed ineffective, satisfying the "cause" prong set out in *Strickland v. Washington*, 466 U.S. 688 (1984) but holding that Noble had suffered no "prejudice" (Appendix C, and amended order, Appendix C(1)). The circuit court's decision was affirmed by the Arkansas Supreme Court on March 6, 1995. (Appendix D). In this published opinion reported at *Noble v. State*, 319 Ark. 407 (1995), the Supreme Court decided the previously denied direct- appeal issue of Noble's motion to suppress although at this juncture in his appeal, the issue had not been raised by Noble. Accordingly, Noble also avers the ineffectiveness of his counsel at the appeal level for the failure to raise this very novel issue as well the decision of the Arkansas Supreme Court to entertain the suppression without notice and an opportunity to be heard by Noble.

On February 20, 1996, Noble filed a Motion to Set Aside Plea and/or Writ of Habeas Corpus in the trial court, and upon its denial (Appendix E), a timely notice of appeal was filed in the Arkansas Supreme Court challenging Noble's First and Sixth Amendment rights as well as the void Sunday proceeding, which was affirmed in a now "unpublished" opinion on June 11, 1998. (Appendix F).

United States District Court.

From the Arkansas Supreme Court, a notice of

appeal was filed in the United States District Court for the Eastern District, Eastern Division pursuant to 28 U.S.C. §2254 seeking habeas corpus relief and challenging both procedural default and the applicability of 28 U.S.C. §2254 as amended, of the Antiterrorism and Death Penalty Act, in regards to the timeliness and the "good cause" exceptions; and whether Noble has sufficiently shown that he suffered "prejudice" from the gross and very serious ineffectiveness of his counsel.

The United States District Court, denied relief without a review on the merits by its unpublished order entered November 19, 1999. Appendix G.

Lastly, on December 15, 1999 pursuant to Rule 3(a) of the Federal Rules of Appellate Procedure, an appeal was filed in the United States Court of Appeals for the Eighth Circuit, the Honorables Bowman, Beam, and Morris Sheppard Arnold, Circuit Judges, presiding. Of the six issues raised before the United States Court of Appeals for the Eighth Circuit, the United States District Court was affirmed on five issues, with one remaining issue remanded to the United States District Court. (Appendix H) We submit for review herein, those five remaining issues that were so affirmed. Rehearing was not sought.

The jurisdiction of this Court is now invoked pursuant to 28 U.S.C. Sections 1254(1); 2254(a); 1257(a); and 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2244(a) "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in Section 2255 . . .

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the **latest** of–

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Arkansas Code Annotated §16-10-114 (prohibiting Sunday Court Proceedings) provides that:

"(a) No court shall be opened to transact business on Sunday unless it is for the purpose of receiving a verdict or discharging a jury.

(b) Every adjournment of a court on Saturday shall always be to some other day than Sunday, except such adjournment as may be made after a cause has been commi.ed to a jury.

(c) This section shall not prevent the exercise of the jurisdiction of any magistrate when it may be necessary, in criminal cases, to preserve the peace or arrest the offenders; nor shall this section inhibit the exercise of the jurisdiction of any magistrate on Sunday in disposing of misdemeanor cases where the defendant desires to and does enter a plea of guilty or a plea of nolo contendre."

Section 103(a) of Arkansas Code Annotated §16-112-103 governing the standard for habeas corpus relief provides in pertinent part, that: "The writ of habeas corpus shall be granted . . . to any person who shall apply for the writ by petition showing . . . evidence, [or] probable cause to believe he is detained without lawful authority . . ." *Arkansas Code Annotated §16-112-103(a).*

Rule 37.1 of the Arkansas Rules of Criminal Procedure states in pertinent part that: "a petitioner in custody under sentence of the circuit court claiming a right to be released, or to have a new trial, or to have

the original sentence modified on the ground: (a.) that the sentence was imposed in violation of the Constitution and Laws of the United States or this State; or (b) the Court imposing the sentence was without jurisdiction to do so; . . . or (d) that the sentence is otherwise subject to collateral attack, may file a verified petition in the court which imposed the sentence praying that the sentence be vacated or corrected.

Rule 14 of the Arkansas Rules of the Appellate Procedural–Criminal provides that: "the Supreme Court need only review those matters brief and argued by the Appellant provided that where either a sentence of life imprisonment or death was imposed, the Supreme Court shall review the entire record for errors prejudicial to the right of the Appellant. *(Adopted and Amended by Per Curium dated July 10, 1995, effective January 1, 1996); as well as* the Due Process Clause of the United States and Arkansas Constitutions, which mandates a review of the entire proceeding by the Court where as in the instant case, the constitutional issues presented are so novel that it clearly represents a clear break with the past.

Rule 37.2 of the Arkansas Rules of Criminal Procedure provides in pertinent part:

"(a) if the conviction in the original case was appealed to the Supreme Court or Court of Appeals,

then no proceedings under this Rule shall be entertained by the Circuit Court while the Appeal is pending;

(b) all grounds for relief available to a petitioner under this Rule must be raised in his or her original petition unless the petition was denied without prejudice. Any ground not so raised or any ground finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence, or any other proceedings that the petitioner may have taken to secure relief from his or her conviction or sentence, may not be the basis for a subsequent petition. All grounds for post-conviction relief from a sentence imposed by a circuit court, including claims that a sentence is illegal or illegally imposed, must be raised in a petition under this Rule.

(c) if a conviction was obtained on a plea of guilty or the petitioner was found guilty at trial and did not appeal the judgement of conviction, a petition claiming relief under this rule must be filed in the appropriate Circuit Court within ninety (90) days of the date of entry of judgement . . . if an appeal was taken of the judgement of conviction, a petition claiming relief under this Rule must be filed in the Circuit Court within sixty (60) days of the date the mandate was issued by the appellate court. In the event an appeal was dismissed, the petition must be filed in the appropriate circuit court within sixty (60) days of the date the appeal was dismissed . . . (d) the

decision of the Court in any proceeding under this Rule shall be final when the judgement is rendered. No petition for rehearing shall be considered.

Rule 37.4 of Arkansas Rules of Criminal Procedures provides that: "if the circuit court finds that for any reason the petitioner is entitled to relief, then the Circuit Court may set aside the original judgement, discharge petitioner, re-sentence him/her, grant a new trial, or otherwise correct the sentence as may appear appropriate in the proceedings."

Rule 31.4 of the Arkansas Rules of Criminal Procedures provides in pertinent part that: "no Defendant charged with a capitol felony may waived either a trial by jury on the issue of guilt, or the right to have sentence determined by a jury, unless: (a) the court in which the cause is to be tried determines that the waiver is voluntary and freely proffered without compulsion or coercion; and (b) the prosecuting attorney, with the permission of the court, has waived the death penalty; and (c) the prosecuting attorney has assented to the waiver of trial by jury and such waiver has be approved by the court. *(And also see Ark. Const. Art. 2 Sec. 7 -- Right to Trial by Jury)*

Rule 31.1 of the Arkansas Rules of Criminal Procedure provides that: "No Defendant in any criminal cause may waived a trial by jury unless the

waiver is assented to by the prosecuting attorney and approved by the court."

Rule 24.4 of the Arkansas Rules of Criminal Procedure provides in pertinent part that: "the court shall not accept a plea of guilty . . . from a Defendant without first addressing the defendant personally, informing him of and determining that he understands . . . (b) the mandatory minium sentence, if any, on the charge; . . . and (e) that he if pleads guilty or nolo contendre, he waives his right to a trial by jury and the right to confront the witnesses against him . . ."

Rule 24.3 of the Arkansas Rules of Criminal Procedures states in pertinent part that:

"(a) a plea of guilty . . . shall be received only from the defendant himself in open court . . .

(b) with the approval of the court and the consent of the prosecuting attorney, a Defendant may enter a conditional plea of guilty, . . . reserving in writing, the right to an appeal from the judgement, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal he shall be allowed to withdraw his plea . . .

(d) no plea of guilty . . . shall be accepted by any court unless the prosecuting attorney of the governmental unit in which the offense occurred is given opportunity to be heard at the time the plea is

tendered. (Amended by Per Curium July 13, 1987, effective October 1, 1987)."

Rule 4-3 of the Rules of the Arkansas Supreme Court--Briefs in Criminal Cases– provides in pertinent part that:

"(g) Appellant's duty to abstract record-- In all felony cases, it is the duty of the appellant . . . to abstract such parts of the record, but *only* such parts of the record as are material to the points to be argued in the appellant's brief;

(h) Court's Review of Errors In Death or Life Imprisonment Cases-- When the sentence is death or life imprisonment, the Court must review errors prejudicial to the appellant in accordance with A.C.A. §16-91-113(a). To make that review possible, the appellant must abstract all rulings adverse to him or her made by the trial court of all objections, motions, and requests made by either party, together with parts of the record as are needed for a understanding of each adverse ruling. **The Attorney General will make certain and certify that all of those objections have been abstracted and will brief all parts argued by the appellant and any other points that appear to involve prejudicial error"**... *(emphasis added)*

STATEMENT OF THE CASE

On Sunday, October 25, 1992, Sherman Noble was rushed into a jail-made courtroom, clothed in jail clothes and shackles. He was scheduled for a jury trial the very next day. Unknowing to Sherman Noble, the Judge had been called over; the bailiff; the prosecutor, and the court reporter. Medal detectors had been installed and activated, and the jail house courtroom was filled to capacity with spectators and the media. Prior to this exact time, Sherman Noble believed that he would be having a "fair" trial, by jury, on the next morning.

Instead, on this Sunday, just prior to the hearing, Sherman Noble had been approached by his trial counsel, Mark Hampton, who told him if he would agree to enter a plea today, right now, that the State would agree to waive the death penalty and not "kill him", if Noble plead guilty this date (Sunday), this minute. Further, Attorney Hampton assured him that if he plead guilty today, the State would agree to allow him to appeal the earlier suppression hearing. Mark Hampton told Mr. Noble that he was "sure" that he would prevail on appeal. It was in this intimidating and coercive environment that Sherman Noble entered a plea. Equally important, eight months had passed since Noble's incarceration, and although he was facing a Capital Murder conviction, his trial attorney Mark Hampton, had only visited with him for two (2) hours, pre-trial– the initial interview should have

lasted longer than two hours. Obviously, there had been no trial preparation by Noble's counsel. Thus, on this Sunday, while standing in a jailhouse, made-up court, in the presence of a jail-room filled with strange spectators and the media; standing in jail-clothing, in shackles, with a judge, bailiff, prosecutor and court-reporter– Sherman Noble virtually stood, without (effective) counsel– and entered a pretextual (conditional) guilty plea to capital murder. From that proceeding, even the government breached its duty.

The Plea. At this Sunday three-minute hearing, Noble's trial counsel, Mark Hampton made a verbal record that the plea was conditioned upon Noble's right to appeal the suppression hearing, and the Court and the State consented by their acquiescence. However, on direct appeal to the Supreme Court of Arkansas, the Court refused to even entertain Noble's appeal stating that because the "condition" had not been reduced to writing, that Noble was barred from his appeal. Under the same law, the Court could not receive a guilty plea in a capital case unless the prosecuting attorney consented to the waiver (Rule 24.3 of the Arkansas Rules of Criminal Procedure), and unless a capital defendant waived his right to a jury trial on the record (Rule 24.4 of the Arkansas Rules of Criminal Procedure). But the Supreme Court turned its head on these deficiencies by the government. And although none of these rights were afforded Noble, the Supreme Court, and all subsequent reviewing courts have refused to address

those very important deficiencies by the State. And in addition to the other issues raised herein, petitioner submits instantly that the duty to insure that the "writing" requirement of Rule 24 was satisfied, as well as the duty to apprise him of his right to a trial by jury and rights that he was giving up this Sunday, was a duty equally shared by the government. Accordingly, he is entitled to habeas relief.

After the Arkansas Supreme Court refused to review Noble's direct appeal, the trial counsel hired a friend attorney to represent Noble on a Rule 37 Post Conviction petition for relief alleging that Noble's trial counsel was ineffective. The only issue raised by the Rule 37 counsel however, was the issue of the requirement to procure a "writing" to reserve an appeal. No other issue was raised. Hence, in that Rule 37 petition, the illegality of the Sunday Court should have been raised in the ineffective assistance of counsel petition, along with the issue of the illegality of the Court accepting Noble's plea of guilty to a capital offense absent the consent of the prosecutor; and without fully comprising Noble of the rights he would be giving up by pleading guilty. Consequently, Noble's appellate counsel was also ineffective. *(Still, to date, Noble has not had the opportunity to be heard on these claims.)*

Findings on the Rule 37 Ineffective Assistance Claim. Initially the petition was heard by the trial court who ruled under *Strickland v. Washington*, that

although Noble had met the "cause" prong of the test for ineffectiveness, he had not met the "prejudice" prong. This finding was in plain error when viewed under the circumstances of this case. Nonetheless, it was affirmed by the Arkansas Supreme Court.

Next, the Arkansas Supreme Court takes puts a new spin on the case-- from the same petition for post conviction relief which raised as its sole issue, the failure to procure a writing, the Arkansas Supreme Court who had previously denied Noble's direct appeal on the suppression hearing without so much as a hearing, went forward, apparently sua sponte, and without giving any notice to Noble-- ruled on the merits of the suppression hearing. This the Court did, without so much as a trial brief from Noble. (Noble v. State, 319 Ark. 407 (1995), and Noble submits instantly again, that from that matter, he was not given due process nor an opportunity to be heard. Still important-- this same Supreme Court of Arkansas later refuses to hear the Sunday statute argument stating that the "Judgment and Commitment" had not been attached– even though the Judgment from the trial court hearing that was appealed from was attached to that brief. This is what Mr. Noble had been faced with, systematically.

Unequivocally, Sherman Noble was denied the effective assistance of counsel at both the trial and appellate levels. Hence not only did Mark Hampton fail to procure a writing at the trial level, but at the

appellate level, he also neglected to appeal any other issues-- specifically, the legality of the Sunday court.

Still, on all subsequent petitions for relief, Noble's cause has been dismissed irregardless of the law either without a hearing at all, or based upon some type of procedural smoke-screen being arbitrarily applied. In fact, as of yet, no Court in the procedural line leading to this Court has entertained any of Noble's issues nor has any Court, to date, provided Noble with an opportunity to be heard.

In addition to the unconstitutional jail-house court proceeding, Sherman Noble, who entered a guilty plea, conditionally, was never informed by the court, that he was otherwise giving up his right to an appeal, or to a trial by a jury, by pleading guilty. Of equal seriousness, the Court also failed to follow the remaining mandate of Rule 24 of the Arkansas Rules of Criminal Procedure which provides that a plea of guilty can only be accepted by the Court if received by the defendant himself <u>with</u> the approval of the court and the consent of the prosecutor. From that date on however, the Courts have arbitrarily claimed "strict compliance" with the law. Everything about this case has been either blatantly illegal or the law arbitrarily applied.

BRIEF ARGUMENT

<u>SUNDAY CONVICTION IS VOID</u>

The Sunday conviction was taken on the sabbath, in violation of Arkansas State law and the United States Constitution. Hence, the Sunday plea was taken at a time when the trial court lacked jurisdiction, rendering the conviction void.

To discuss summarily, it is well known that in all cases at law, both the statutory and the constitutional bases for jurisdiction must be satisfied. Constitutionally, in order for a Court to render a valid decision, it must have jurisdiction to hear the case.

Arkansas Code Annotated §16-10-114 ("the Sunday statute") prohibits holding court proceedings on a Sunday unless such proceedings fit into a specific exception. Thus, judicial acts other than those specifically authorized by statute cannot lawfully be performed on Sunday, and under the strict scrutiny test, this law must be upheld where it is necessary to achieve a compelling or overriding government purpose (such as overreaching, first amendment right of religious or sacrilegious affiliation, Sunday considered the sabbath, right to life and liberty, etc). Under even the lowest standard, the Sunday statute must be upheld where it is rationally related to a legitimate interest. Thus, where the conviction rendered by the court is facially invalid; and for violation of his fourth, fifth, sixth, and fourteenth amendment rights as guaranteed by both the United States and the Arkansas Constitutions, and most importantly, where the Sunday plea was taken at a

time when the trial court lacked jurisdiction, the same conviction is void. Moreover, where Sherman Noble was not informed of his right to or waiver of a right to appeal *(discussed supra)*, and where petitioner did not waive his right to a jury *(discussed supra)*, and where petitioner was denied effective assistance of counsel *(discussed supra)*, the instant petition and writ should be granted. Equally, the courts below committed reversible error. (And see Chester v. Arkansas State Board of Chiropractic Examiner, 435 S.W.2d 100 (1968), citing 26 A.L.R. 2d 997. (and the progeny of caselaw thereafter), where the Arkansas Supreme Court reiterated that "it has been long established, even from its inception at Common Law that Sunday was considered "dies non juridicus" meaning that any judgment rendered in a judicial or quasi-judicial proceeding is void." As of date, this law has not been repealed nor overruled.

INEFFECTIVE ASSISTANCE OF COUNSEL--CAUSE AND PREJUDICE

From 1977, in the case of Wainwright v. Sykes, 433 U.S. 72 (1977), the Supreme Court established the cause and prejudice test that would apply in cases where a habeas petitioner had procedurally defaulted in state court. The cause and prejudice test became applicable to defaults on appeal as well, in 1984, in the case of Reed v. Ross, 468 U.S. 1 (1984). In establishing guidelines for the federal courts to follow for determining whether a petitioner satisfies the requisite "cause"and "prejudice" standards, the

Supreme Court later in 1976 rendered a decision to give such direction. Hence, in Murray v. Carrier, 477 U.S. 478 (1986) the Supreme Court held that "a federal habeas petitioner need only satisfy the district court that the procedural default resulted from his attorney's ignorance or inadvertence, rather than from a deliberate tactical decision. "Ignorance or oversight implies that counsel failed to exercise it at all. Hence, in order to establish cause, a federal habeas petitioner need only satisfy the district court that the failure to object or to appeal his claim was the product of his attorney's ignorance or oversight, not a deliberate tactic. Murray at 484.

In the instant case, while the trial court conceded that counsel for Sherman Noble was ineffective at the trial level-- satisfying the "cause" prong of the Strickland case, it erred when it found that the "prejudice" prong had not been met. Thus, it was because of his trial counsel, that Sherman Noble was unable to pursue a direct appeal on the merits of his motion to suppress. Then on appeal, his counsel failed altogether to raise any issues. Hence under Murray, it was decided that "whatever may be the case where counsel has failed to take an appeal at all, counsel's failure to raise a 'particular' claim on appeal is to be scrutinized under the cause and prejudice standard when that failure is treated as a procedural default by the state courts. The same standard is applicable here.

In an even earlier case, Brown v. Allen, 344

U.S. 443, 486 (1953), another basis constituting "cause" for habeas relief was set, that being where some interference by officials made compliance impracticable. Importantly, the Court in Brown went on to hold that "similarly, if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not conduct trials at which persons who face incarceration must defend themselves without adequate legal assistance." Brown, *citing Cuyler v. Sullivan, 446 U.S. 335, 344 (1980).* Ineffective assistance of counsel, then, is cause for a procedural default. Cause has also been defined by the Supreme Court as "some objective factor external to the defense that impeded counsel's efforts to raise the claim in state court or in a prior habeas petition. McClesky v. Zant, 499 U.S. 467 (1991). Examples given in McClesky included "government interference".

PREJUDICE

The habeas petitioner must show 'not merely that the errors at trial created a possibility of prejudice but that they worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimensions. Murray v. Carrier, 477 U.S. 478, 494 (1986). Hence, "such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied 'fundamental fairness' at trial." Murray at 494.

Instantly, as discussed in brevity in the "Statement of the Case" above, the constitutional violations committed against Sherman Noble are blight at the least. It should shock the conscious of this Court and the justice system. A balance of the inequity alone should suffice to satisfy the prejudice requirement. Sherman Noble did suffer prejudice in this matter and the same should be reviewed.

Finally, Noble submits herein that the instant petition is ripe for review pursuant to the Anti-Terrorism and Effective Death Penalty Act (herein "AEDPA"). As known, a statute of limitations was born on April 26, 1996 when President Clinton signed the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The Sunday Plea was held in 1992, however, the current petition for review and habeas relief was initiated on March 20, 1996, one month prior to the Clinton signing. Worth mentioning, at the the time Clinton signed the AEDPA bill, Noble had at that time pending in the trial court, his first petition challenging the Sunday plea. And since only one appellate action can be pending in any court at a time. *(Rule 37.2 of the Arkansas Rules of Criminal Procedure)*, the subsequent appeal of the trial court's denial, the affirmance by the Arkansas Supreme Court and the appeal to the United States District Court for the Eastern District, through to the United States Court of Appeal for the Eighth Circuit, is deemed timely.

Notwithstanding, the AEDPA provides *inter alia,* that a federal habeas corpus petition must be filed within one year after one of four events occurs. **If applicable,** this limitation period commences from the latest of four dates or events. The computation of a final judgement date is relevant only if the other options or starting dates are inapplicable. Accordingly, the "final judgment" date is inapplicable here. Moreover, the Eighth Circuit Court of Appeals has taken the position that the AEDPA. limitations period is not jurisdictional in nature, holding that the doctrine of "equitable tolling" may operate to exclude time from the limitation period. Moore v. United States, 173 F.3d 1131, 1134 (8th Cir. 1999) *where extraordinary circumstances beyond a prisoner's control makes it impossible to file a petition on time. Citing Calderon v. United States District Court, 128 F.3d 1283, 1288 (9th Cir. 1997) and see Alvarez-Machian v. United States, 107 F.3d 696, 701 (9th Cir. 1997).* And for these additional reasons, the instant petition is timely, and alternatively, subject to the doctrine of equitable tolling. More particularly, we submit that the time restraints of 28 U.S.C. Section 2244 do not apply for three reasons: 1) pursuant to Section (2) which provides that "the time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted towards any period of limitation under this subsection"; and 2) pursuant to Section (1)(D) with excludes those cases "where the petitioner could not

have discovered the defect with due diligence"; and 3) we submit that based upon the totality of the circumstances in this case, the application of "equitable tolling" should apply. Hence as set out in Calderon v. United States District Court for Central Dist. Of Cal, 112 F.3d 386 (9th Cir. 1997), where the Ninth Circuit Court of Appeals held that the limitation period may equitably tolled if 'extraordinary circumstances' beyond a prisoner's control render it impossible for his to file a timely petition," and where the instant case is replete with "extraordinary" circumstances– Sunday Court set up by the State; ineffective assistance of counsel; appeals dismissed without any hearing on the merits– the instant cause is excepted from the time restraints of 28 U.S.C. 2244 *(as amended)*.

It is for all of the foregoing reasons and where all non-futile state remedies have been applied for and exhausted, that the instant petition is properly before this Court.

REASONS FOR GRANTING THE PETITION

Sherman Noble submits the following six novel and very important reasons why this Court should grant the instant petition for certiorari:

1. The United States Court of Appeals for the Eighth Circuit has entered a decision in conflict with the decision of other United States Courts

of Appeal on the same important issue herein;

2. The Supreme Court of Arkansas, District Court for the Eastern District of Arkansas, and subsequently, the United States Courts of Appeal for the Eighth Circuit has decided an important federal question in a way that conflicts with prior decisions of this Court;

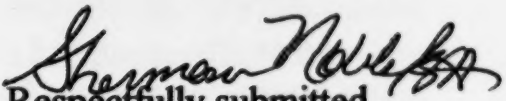
3. The Supreme Court of Arkansas, District Court for the Eastern District of Arkansas, and subsequently, the United States Courts of Appeal for the Eighth Circuit has parted far from the accepted and usual course of judicial proceedings; and has sanctioned such a departure by the lower courts, so as to call for an exercise of this Court's supervisory power; and

4. The Supreme Court of Arkansas, District Court for the Eastern District of Arkansas, and subsequently, the United States Courts of Appeal for the Eighth Circuit has decided an important question of federal law that has not been, but should be settled by this Court.

CONCLUSION

This case presents some of the most novel issues and issues of overreaching and misapplication of the laws, possibly, in the history of jurisprudence.

Hence, at no time during the trial court proceedings has Sherman Noble been afforded effective assistance of counsel, nor has he been afforded any of his constitutional rights as guaranteed by the First, Fifth, Sixth, and Fourteenth Amendments to the Arkansas and United States Constitution. And at no time during the course of appellate proceedings has Sherman Noble been afforded any notice or an opportunity to be heard. Therefore, in my very last opportunity to test of our legal system and the guarantee of rights afforded individuals in the United States, it is prayed upon this Honorable Court that the instant petition be granted.



Respectfully submitted,
BY: SHERMAN NOBLE
Inmate No.: 100015
2501 State Farm Road
Tucker, AR 72168

DATED this 7th day of December, 2001.

APPENDIX

INDEX

APPENDIX A - Judgment and Commitment Order from trial Court

APPENDIX B - Dismissal of Direct Appeal by Arkansas Supreme Court

APPENDIX C - Denial of Rule 37 Post-conviction Relief by trial court

APPENDIX D - Supreme Court of Arkansas affirmed trial court

APPENDIX E - Denial of Petition to Set Aside Plea from trial court

APPENDIX F - Supreme Court of Arkansas affirmed trial court

APPENDIX G - U.S. District Court's denial of Habeas Corpus relief

APPENDIX H - U.S. Court of Appeal affirms on five of six issues

APPENDIX A

Judgment and Commitment Order from trial Court

JUDGMENT AND COMMITMENT ORDER
IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ARKANSAS, ELEVENTH JUDICIAL DISTRICT, SECOND DIVISION.

On 10/25/1992 the Defendant personally appeared before the Court with legal counsel and having been informed by the Court of the nature of the charge(s), of his constitutional and legal rights, of the effect of a guilty plea upon those rights, and of his right to make a statement before sentencing, the Court made the following findings:(check one applicable)
Defendant voluntarily, intelligently, and knowingly entered a plea of guilty.
DEFENDANT'S FULL NAME: SHERMAN D. NOBLE;
DATE OF BIRTH: 5-4-71; RACE: BLACK; SEX: M
DEFENDANT'S ATTORNEY: Mark F. Hampton;
PROSECUTING ATTORNEY OR DEPUTY: Carol Billings
Defendant was represented by __X__ private counsel

There being no legal cause shown by the Defendant, as requested, why judgment should not be pronounced against him, a judgment of conviction is hereby entered against the Defendant on each charge enumerated and court costs assessed. The County Sheriff is hereby ordered and directed to transport the defendant to the Arkansas Department of Correction

where he is sentenced to hard labor for the term specified on each charge.

STATUTE NO: 5-10-101; OFFENSE: Capitol Murder; OFFENSE DATE: 3-21-92; DOCKET NO: 92-265; COUNTS: I; F/M: F; CLASS: Y; SENTENCE: Life W/O Parole.

TIME TO BE SERVED AT A.D.C: Life without parole.

JAIL TIME CREDIT: 0195 days.

DATE: 10-25-92; CIRCUIT JUDGE: H.A. Taylor

Date filed: 10-26-92

/s/ H.A. Taylor, Circuit Judge

APPENDIX B
Dismissal of Direct Appeal by Ark. Supreme Court

SUPREME COURT OF ARKANSAS
SHERMAN NOBLE, Appellant
V. No: CR-93-427
STATE OF ARKANSAS, Appellee
Opinion Delivered: SEP 27, 1993
Appeal from Jefferson County
Circuit Court (CR92-265-2)
Honorable H.A. Taylor, Circuit Judge
Appeal Dismissed
David Newbern, Associate Justice

Sherman Noble pleaded guilty to capital felony murder and was sentenced to life imprisonment without parole. On appeal, Noble contends the Trial Court should have granted his motion to suppress his in-custody statement made to the police. He argues the statement was involuntary.

The basis of this appeal of a guilty plea conviction is Ark.R.Crim.P. 24.3(b), which states:
(b) With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendre [contendere], reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

Nothing before us shows that Mr. Noble conditioned his guilty plea by reserving, in writing, his right to appeal. Nor is there any indication that the Trial Court or the prosecutor consented.

Absent any showing that these requirements were met, we dismiss the appeal.

Appeal dismissed.

APPENDIX C

Denial of Rule 37 Post-conviction Relief by trial court

ORDER DENYING PETITION FOR RELIEF UNDER RULE 37

The Court has examined the Rule 37 petition filed by Defendant and the Response thereto filed by the State.

The Court finds that the proper test of ineffectiveness of counsel is the "cause and prejudice" test of Strickland v. Washington. Applying that test to the case at bar, the Court makes the following conclusions:

Defendant has proved "cause." The Court finds that the counsel's failure to observe the procedural requirements to preserve the right to appeal fell below the standard of competence required, whether that is denominated as ineffective assistance of counsel at trial or on appeal.

If "prejudice" is, as Defendant suggests, merely the failure to obtain consideration on the merits, then Defendant would satisfy the prejudice prong. However, the Court disagrees with Defendant's suggested standard of prejudice. The Court finds that the appropriate standard of prejudice is whether there is a reasonable probability that Defendant would have

succeeded on the merits of his appeal had it been determined on the merits.

To make that finding would in essence require the Court to reverse its decision on the motion to suppress from which Defendant attempted to appeal. There is no further evidence to present. The Court is unwilling to reverse its findings denying the motion to suppress.

Because of the nature of the findings made herein, the Court finds that there is no need for a hearing. Defendant's request for a hearing is therefore denied as unnecessary.

IT IS SO ORDERED.

/s/ Fred Davis, Circuit Judge
Date: March 7, 1994

APPENDIX D

Supreme Court of Arkansas affirmed trial court

MANDATE- AFFIRMED CRIMINAL
STATE OF ARKANSAS
In the Supreme Court; Filed: March 6, 1995
BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock,on the 3rd Day, being the first Monday of October, A.D. 1994 amongst others were the following proceedings: On the 13th day of February, A.D. 1995, a day of said term:
CR94-572
SHERMAN NOBLE, APPELLANT
V. Appeal from Jefferson Circuit (CR92-265-3)
STATE OF ARKANSAS

This cause came on to be herd upon the transcript of the record of the Circuit Court of Jefferson County, and was argued by counsel; on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be, and the same is hereby in all things affirmed and that unless appellant shall forthwith surrender himself

to the Sheriff of Jefferson County in execution of said judgment, his bond be declared as forfeited.

/s/ Jeanette Hence, Clerk

APPENDIX E

Denial of Petition to Set Aside Plea from trial court

STATE OF ARKANSAS, RESPONDENT
V. NO: CR-92-265-3
SHERMAN NOBLE, PETITIONER

ORDER

Now on this day comes on this matter for hearing on the Petition of Sherman Noble to Set Aside Plea, Judgment and Commitment and/or Petition for Writ of Habeas Corpus, and the Plaintiff/Respondent's Response, and from the statements and arguments of counsel and other matters and things before the Court, the Court doth find:

That Defendant/Petitioner, Sherman Noble, entered a plea of guilty to the offense of capital murder on October 25, 1992, a Sunday.

That on November 6, 1992, he filed a Notice of Appeal and Designation of Record.

That on September 27, 1993, his appeal was dismissed by the Arkansas Supreme Court.

That on November 1, 1993, his Petition for Rehearing was denied by the Arkansas Supreme Court.

That on November 29, 1993, he filed a Petition for Relief under Rule 37, A.R.Crim.P., alleging as grounds, ineffective assistance of trial counsel.

That on March 7, 1994, an Order was entered denying relief under Rule 37, and an amended Order was also entered on March 15, 1994.

That on March 15, 1994, a Notice of Appeal and Designation of Record was filed, and once again, the judgment of the trial court was affirmed by the Supreme Court on March 3, 1995.

That on February 20, 1996, Defendant/Petitioner brings this current and latest petition, that being to Set Aside Plea, Judgment and Commitment and/or Petition for Writ of Habeas Corpus. He alleges as grounds that the entry of his plea on October 25, 1992, a Sunday, violated the provision of Arkansas Code Annotated Section 16-10-114, and alleges that such proceedings held on a Sunday are void. Noble characterizes te Court's acceptance of his plea on a Sunday as being jurisdictional in nature and concludes that since the provisions of Arkansas Code Annotated Section 16-10-114, were violated, that the trial court had no jurisdiction.

Although his February 20, 1996, petition had no brief attached, Defendant/Petitioner did forward such a document to the Court on the eve of the May 3,

1996, hearing. His assertion that the trial court lacked jurisdiction is the central and governing issue of his petition.

That the State has responded and asserts that while the trial court's failure to follow certain statutory procedure might constitute reversible error, it does not deprive the Court of its jurisdiction.

Persuasive to this Court is the apparent conflict with Rule 24 of the Arkansas Rules of Criminal Procedure, as well as Arkansas Code Annotated Sections 16-13-207 and 16-13-210. Arkansas Code Annotated Sections 16-13-207 (Act 49 of 1955, approved February 11, 1955), provides that a circuit court "may be in session at any time the Judge thereof may deem necessary." Arkansas Code Annotated Sections 16-13-210 (Act 91 of 1961, approved February 13, 1961), provides that a Circuit Judge "at any time . . . may hear, adjudicate, or render any appropriate order with respect to, any cause or matter pending in any circuit court over which he presides." These Acts were enacted after Arkansas Code Annotated Sections 16-10-114 (Act 30 of 1955, approved February 2, 1955). Certainly the apparent conflict between the two statutory enactments is resolved by giving controlling force to the later of the Acts. Likewise, Rule 24 provides no limitation as to the day of the week on which a plea may be taken, and it is well settled to the extent that a statute places any limitation on a court rule, the Court rule would

remain supreme (Hickman v. State, 316 Ark. 783 (1994)).

Accordingly, the Court finds that the trial court did not lose jurisdiction on Sunday, October 25, 1992, when it accepted the defendant's plea of guilty.

Further, the Court finds that should this Petition be characterized as one pursuant to Rule 37, it is not timely since there was a prior Rule 37 wherein the issue could or should have been raised and was not. Arkansas Rules of Criminal Procedure 37.2(b) specifically requires the grounds that a sentence was illegal or was illegally imposed to be raised by Rule 37 Petition and should not be the basis for any subsequent petition.

In summary, the instant petition is not well taken, is not timely made, and will be denied in its totality.

IT IS SO ORDERED this 21 day of May, 1996.

/s/ Fred D. Davis, Circuit Judge
(Filed: May 21, 1996)

APPENDIX F

Supreme Court of Arkansas affirmed trial court

SUPREME COURT OF ARKANSAS
SHERMAN NOBLE, Appellant
V.
STATE OF ARKANSAS, Appellee
No: CR-96-1442
Opinion Delivered: JUN 11, 1998
Appeal from the Circuit Court of Jefferson County (NO. CR92-265-3); Honorable FRED DAVIS, Judge
AFFIRMED
PER CURIAM

In 1992, Sherman Noble pleaded guilty in the Circuit court of Jefferson County to capital felony murder and was sentenced to life imprisonment without parole. He subsequently filed a petition in the circuit court pursuant to Criminal Procedure Rule 37 which was denied. This court affirmed the order. Noble v. State, 314 Ark. 240, 862 S.W.2d 234 (1993).

In 1996, Noble filed in the Circuit court of Jefferson County a second petition for postconviction relief, again seeking to set aside the guilty plea and judgment. Although the petition did not contain any reference to whether Noble was in custody in Jefferson County when he filed the petition, the petition also sought a writ of habeas corpus from the

Jefferson County court to effect his release from custody. The court denied relief, and appellant Noble brings this appeal. We find no error and affirm the order.

Appellant argues that he was entitled to relief pursuant to Criminal Procedure Rule 37 because his guilty plea was entered on a Sunday.[1] Appellant, however, had already filed a Rule 37 petition challenging the plea and was not entitled to proceed again under the rule. Rule 37.2(b) provides that all grounds for relief must be raised in the original petition. A petitioner is not entitled to file a second petition pursuant to Rule 37, unless the original petition was specifically denied without prejudice to filing a subsequent petition. Williams v. State, 273 Ark. 315, 615 S.W.2d 628 (1981). When appellant's original petition was denied, it was denied with prejudice; therefore, he could not proceed again under the rule.

Moreover, even if appellant had been entitled to file a second petition, he could not have prevailed. We have held that even when a court is found to have been created by an unconstitutional act, the judgments of that court are valid and not open to collateral attack on the basis of the court's jurisdiction. Tumbs v. State, 290 Ark. 214, 718 S.W.2d 105 (1986); see also Watson v. State, 291 Ark. 358, 724 S.W.2d 478 (1987). A proceeding under Rule 37 is a collateral attach on a judgment. Chisum v. State, 274 Ark. 332,

625 S.W.2d 448 (1981). As a result, appellant did not state a ground to warrant postconviction relief.

Appellant's remaining arguments can be combined. Appellant contends tat a writ of habeas corpus was warranted because he was in custody by virtue of a judgment entered in a court without jurisdiction. As the appellant's brief does not contain an abstract of the judgment, we cannot say that the judgment reflects a jurisdictional defect. Unless a petitioner can show that the trial court lacked jurisdiction or that the commitment was invalid on its face, there is no basis for a finding that the writ of habeas corpus should issue. Birchett v. State, 303 Ark. 220, 795 S.W.2d 53 (1990).

Affirmed.

APPENDIX G

U.S. District Court's denial of Habeas Corpus relief

IN THE UNITED STATE DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS, PINE BLUFF DIVISION

SHERMAN NOBLE, PETITIONER

V. CASE NO: H-C-99-98

LARRY NORRIS, Director; Arkansas Department of Corrections

JUDGMENT

In accordance with the Court's Order entered this date, judgment is hereby entered dismissing this petition for writ of habeas corpus. The relief sought is denied.

IT IS SO ORDERED this 17 day of November, 1999.

/s/ Henry Woods, United States District Judge

(Filed: November 19, 1999)

ORDER

The Court has reviewed the proposed findings and recommendation disposition received from Magistrate Judge H. David Young and the objections

filed in response, and has further reviewed the relative record de novo. The Findings and Recommendations are adopted in their entirety as this Court's findings. Judgment shall be entered accordingly.

IT IS SO ORDERED this 19 day of November, 1999.

/s/ Henry Woods, United States
District Judge
(Filed: November 19, 1999)

APPENDIX H

U.S. Court of Appeal affirms on five of six issues

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO: 00-1155

SHERMAN NOBLE, Appellant

v.

Larry Norris, Director, Arkansas Department of Correction, Appellee

Appeal from the United States District Court for the Eastern District of Arkansas

Submitted: June 28, 2001

Filed: July 13, 2001

Before BOWMAN, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Sherman Noble appeals te District Court's dismissal of his 28 U.S.C. §2254 petition. The District Court concluded tat Noble had procedurally defaulted five of the six claims he presented in his petition. We agree, and affirm the dismissal of these five claims. See 8th Cir.R. 47B.

The District Court determined that Noble's sixth claim, ineffective assistance of counsel founded in counsel's failure to preserve Noble's right to appeal the denial of a motion to suppress, was not procedurally defaulted. The Court dismissed it, however, concluding that Noble's §2254 petition was

untimely.

Subsequently developed case law has rendered the court's conclusion incorrect because Noble had a "properly filed" postconviction petition pending in state court from February 1996 through June 11, 1998. See 28 U.S.C. §2244(d)(2) (Supp. IV 1998) ("properly filed application for State post-conviction or other collateral review" tolls limitations period); Artuz v. Bennett, 121 S. Ct. 361, 363-65 (2000) (defining "properly filed"); Snow v. Ault, 238 F.3d 1033, 1035 (8th Cir.) (Applying 28 U.S.C. §2244(d) definition in concluding that second postconviction motion in state court, subject to dismissal as successive under state law, was nonetheless "properly filed"), cert. denied, 121 S. Ct. 1663 (2001). As such, his June 10, 1999 §2254 petition was timely.

We therefore remand this case to the District Court for consideration of the ineffective-assistance claim on the merits. See Burns v. Gammon, 173 F.3d 1089, 1094 (8th Cir. 1999). The judgment of the District Court is affirmed in all other respects. Noble's motion to supplement the appellate record with the documents he has tendered is granted.

A true copy.

Attest: Clerk, U.S. Court of Appeals, Eighth Circuit.

PROOF OF SERVICE

I, Sherman Noble do swear or declare that on this date, December 7, 2001, as required by Supreme Court Rule 29, I have served three copies of the enclosed corrected PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail, properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served as follows:

Larry Norris c/o Mark Pryor
Attorney General of Arkansas
300 Catlett-Prien Tower Building
323 Center Street
Little Rock, AR 72201

I declare under penalty of perjury that the following is true and correct.

Executed on this 7th day of December, 2001

Sherman Noble Jr.
Petitioner